

LAW OFFICES

SHOOK, HARDY & BACON

REPORT ON RECENT ETS
AND IAQ DEVELOPMENTS

March 4, 1994

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REPORT ON RECENT ETS AND IAQ DEVELOPMENTS

IN THE UNITED STATES

REGULATORY AND LEGISLATIVE MATTERS

103D CONGRESS

[1] Waxman Holds Press Conference on Smoking Legislation

Representative Henry Waxman (D-Cal.) held a press conference on February 23, 1994, to announce that the National Council of Chain Restaurants endorses the Smoke-Free Environment Act of 1993 (H.R. 3434), which he introduced. The council represents some 40 restaurant chains that operate more than 90,000 individual restaurants. Its support of national legislation on the issue rather than a voluntary ban was acknowledged as the only way for restaurants wishing to impose smoking restrictions to remain competitive.

H.R. 3434 would restrict smoking to separately ventilated areas of nearly every nonresidential building in the country. According to statements made at the press conference, Waxman agreed to modify the legislation at the urging of the council by (i) prohibiting compensatory or punitive damages from being awarded in lawsuits filed under the law; and (ii) clarifying that isolated violations of the law by individuals within the public facility will not be considered violations of the law by the public facility.

Representatives of the Building Owners and Managers Association International (BOMA) also attended the press conference and announced that BOMA was urging Congress to pass the Waxman legislation. BOMA's prepared statement cited the EPA Risk Assessment on ETS to support its call for "a ban on workplace smoking as an essential component for improving indoor air quality."

A statement prepared by EPA Administrator Carol Browner for the press conference claimed that ETS

causes children to develop asthma. She praised the restaurants for "their support of protecting American people from second-hand tobacco smoke." ASH also contributed a statement praising the restaurant industry and stated, "Action on Smoking and Health has been widely credited with first raising the issue of smoking in fast-food outlets in light of the dangers to children documented in the EPA report. The Washington Post credited ASH with being the catalyst in persuading McDonald's to begin experimenting with smokefree outlets."

[2] PRO-KIDS Amendment Gets Approval From House

On February 23, 1994, the House, by voice vote, agreed to amend its "Goals 2000: Educate America Act" (H.R. 1804) with the companion bill passed by the Senate (S. 1150). Included in the Senate bill is Senator Frank Lautenberg's (D-N.J.) PRO-KIDS legislation (S. 261), which would restrict smoking to separately ventilated areas of federally funded facilities providing services to children under the age of 18. Because the House approved the measure with its own amendments, the bill was sent to a joint conference committee, which will work out the differences in the House and Senate versions. This is the first tie that one of Lautenberg's antismoking amendments has been approved on the floors of both the Senate and the House. Two previous efforts by Lautenberg to amend appropriations measures were successful in the Senate, but the amendments were deleted before they could be voted on by the full House. The PRO-KIDS measure now appears at Title XII, sections 1201-1208, of the education bill.

[3] Representative Durbin Amends PRO-KIDS to Education Bill

On February 24, 1994, Representative Richard Durbin (D-Ill.) offered for amendment his Preventing Our Kids from Inhaling Deadly Smoke (PRO-KIDS)

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Act of 1993 (H.R. 710), to the Improving America's Schools Act of 1994 (H.R. 6). The PRO-KIDS amendment would restrict smoking to separately ventilated areas of buildings where federally-funded services are provided to children under the age of 18. EPA would be given regulatory authority to enforce the restrictions.

H.R. 710 is the companion to the Senate's S. 261, Senator Frank Lautenberg's bill that was recently amended to "Goals 2000: Educate America Act" (H.R. 1804, S. 1150).

Amendments to H.R. 6 were considered by the House during the first week of March. As of this writing, it is unknown whether the House voted on the amendments.

[4] Consumer Coalition Calls for Smoking Bans

The Coalition for Consumer Health and Safety has called on Congress and the Clinton administration to ban smoking in federally owned buildings and in facilities housing federally funded children's programs. In a report submitted on February 8, 1994, the coalition summarized the progress made in 1993 toward improving the nation's public health and outlined its priority agenda for 1994 in seven issues areas. Tobacco use and indoor air quality were two of the issues on the coalition's agenda. The coalition is a Washington, D.C.-based umbrella group of 39 consumer, safety and health advocacy groups and health insurance industry trade associations. *See BNA Product Liability Daily*, February 25, 1994.

U.S. OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA)

[5] Draft Notice of IAQ Rulemaking Delivered to OSHA Administrator

According to a press report, a draft of a Federal Register notice outlining OSHA's plan to address workplace IAQ and ETS in a single rulemaking was delivered to OSHA administrator Joseph Dear on February 22, 1994. Agency officials noted that the draft will undergo changes before it is published in March, but that it is expected to be a general proposal which will include a limited amount of regulatory text that will address broad workplace IAQ issues ranging

from inadequate ventilation to ETS exposure. The draft is reportedly not an advance notice of proposed rulemaking, but it is intended to elicit comment.

OSHA says it plans to conduct a series of public hearings following publication of the proposal. It is anticipated that the hearings will add to the more than 1,200 comments and studies the agency received since 1991 when it published a request for information on indoor air.

The approach being taken by the agency will apparently resemble an approach tried initially in the State of Washington, where Dear headed the state's Department of Labor and Industries prior to his appointment as head of OSHA in 1993. According to one OSHA official, "The Washington department has a keen insight on how to propose a standard and their input was very useful."

Agency officials have reportedly said that the agency's regulatory schedule on indoor air includes a two step process: the "step one" proposal would address indoor air during the second quarter of fiscal 1994 and would be accompanied by a minimal regulatory analysis; the "step two" proposal would occur during the first quarter of fiscal 1995 and would include a preliminary regulatory impact analysis. *See BNA Labor Daily*, February 28, 1994.

[6] OSHA Publishes Final Rule Amending Hazard Communication Standard

On February 9, 1994, OSHA published a final rule modifying its Hazard Communication Standard. The standard requires employers to inform employees about the risks associated with the use of hazardous substances in the workplace. Among the changes made in the final rule is a provision exempting consumer products from the standard where they are used in the workplace "for the purpose intended by the chemical manufacturer or importer of the product, and the use results in a duration and frequency of exposure which is not greater than the range of exposures that could reasonably be experienced by consumers when used for the purpose intended."

OSHA decided to continue to rely upon the labels required by the Consumer Product Safety Commission with respect to consumer products, but recognized that additional warnings could be required where products

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such as cleansers are used in sufficient quantities to result in significant exposures to toxic materials.

The amendments to the standard will become effective on March 11, 1994. See *Occupational Safety & Health Reporter*, February 16, 1994.

[7] Reich and Dear Testify in Support of OSHA Reform Legislation

On February 9, 1994, testifying before a Senate committee, Labor Secretary Robert Reich endorsed the OSHA reform legislation (S. 575) introduced by Senator Edward Kennedy (D-Mass.). Among the modifications reportedly suggested by Reich was a recommendation that the bill provide less stringent timetables for OSHA to develop health and safety rules. According to Reich, the time frame for responding to rulemaking petitions should be expanded to 120 days, and the time frame for publishing proposed rules after making a decision to proceed with a standard should be expanded to 18 months. Reich also reportedly endorsed a section of the bill that would make it more difficult for those challenging OSHA rules to have those rules overturned by federal courts.

Joseph Dear, assistant secretary of labor in charge of OSHA, reportedly testified before a House subcommittee on February 10, 1994, in order to endorse the House version of OSHA reform legislation (H.R. 1280) introduced by Representative William Ford (D-Mich.). The full Education and Labor Committee is scheduled to mark up the bill on March 2, 1994, and Ford said at the hearing that he plans to bring the matter to a floor vote in the House before summer.

Meanwhile, a number of conservative House Democrats have reportedly asked Reich to reconsider his endorsement of the Democratic-backed OSHA reform proposals. Although the mostly southern Democrats who signed the February 4 letter to Reich said they were in favor of workplace safety law reform, they also said they believe H.R. 1280 will create more paperwork and bureaucracy and do little for safety. Representatives of the business community reportedly continue to oppose the reform legislation, while a broad coalition of labor, environmental and public health groups have announced a campaign to persuade Congress to pass H.R. 1280 and S. 575. See *Occupational Safety & Health Reporter*, February 16, 1994.

U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA)

[8] Building Air Quality Alliance Launched

The first meeting of the EPA's Building Air Quality Alliance was held on February 22, 1994. The program, which has been designed to encourage private companies to voluntarily reduce purported threats to IAQ, is apparently similar in concept to EPA's Green Lights program, by which EPA furnishes advice on reducing energy-related expenses. Further details about the program appear in issue 62 of this Report, December 17, 1993.

Participants in the February 22 meeting, described as leaders in the IAQ community, discussed an EPA issue paper which indicates that EPA expects the group to formulate its first "Action Plan" by spring 1994, with initial "Building Partners" enlisted in the program by early summer. EPA suggests that an action plan include: (i) "designating a staff member to take charge of indoor air quality and making sure they are properly trained; and (ii) developing and implementing preventive operations and maintenance schedules for building ventilation systems."

EPA anticipates that the first building partners will be "owners and managers of public and commercial buildings. EPA believes the Alliance program should initially target office buildings, in part because our existing guidance . . . directly addresses the needs of these types of buildings." The incentives to be offered building partners include public recognition, guidance materials and information about new IAQ resources. EPA is also charging the Alliance with identifying and developing "model codes, leases, insurance contract language ensuring good IAQ management, and model standards."

Initial members of the Alliance include the American Bar Association, American Lung Association, BOMA, Union of Operating Engineers, Consumer Federation of America, AFL-CIO, National Medical Association, American Medical Association, National Audubon Society, Consumer Product Safety Commission, International City Manager's Association, National Association of Counties, Environmental Law Institute, U.S. Departments of Housing and Urban Development,

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Energy and Health and Human Services, and the Radon-Indoor Air University Training Centers. See *Indoor Pollution News*, February 21, 1994.

[9] Administration's Approach to Science Policy Revealed

During a hearing on EPA's risk assessment practices held before two House subcommittees on February 1, 1994, top administration officials reportedly outlined the Clinton administration's plan for dealing with science policy matters. EPA's new Science Policy Council was discussed during the hearing, and, according to written testimony submitted by vice-chair Lynn Goldman, the council's responsibilities will include improving risk assessment methods at EPA. According to Goldman, the council will be producing a series of guidance memoranda "beginning with a general statement of our basic approach" to risk assessment.

Also reportedly addressed during the hearing was President Clinton's executive order establishing the National Science and Technology Council. Managed by staff in the White House Office of Science and Technology, council members currently include the president; vice president; secretaries of commerce, defense, energy, health and human services, state, and interior; administrators of the National Aeronautics and Space Administration and EPA; directors of the National Science Foundation and OMB; the national security adviser; and the assistant to the president for economic policy and domestic policy.

According to a written statement submitted by an Office of Management and Budget administrator, the council is organizing a subcommittee "to evaluate the risk assessment aspects of risk analysis. This subcommittee will examine the scientific issues associated with the evaluation of risk, including issues pertaining to cancer, non-cancer, and ecological risk assessment methods in general." See *Occupational Safety & Health Reporter*, February 9, 1994.

[10] ETS Risk Assessment Litigation: Parties Still Await Rulings Relating to Motion to Dismiss

The district court still has not ruled on plaintiffs' request for oral argument on EPA's motion to dismiss, or on the motion itself. The court also has not ruled on either of the pending motions for leave to file *amicus curiae* briefs.

Briefing on the motion to dismiss is considered to be complete. Plaintiffs' request for oral argument was made in September 1993; EPA joined in the request for oral argument in November.

Plaintiffs' complaint in this case seeks a declaration that EPA's decision to designate ETS a Group A carcinogen, together with the risk assessment on which the decision is based, is unauthorized, arbitrary and capricious, contrary to procedures required by law, and in violation of due process. Plaintiffs also seek a permanent injunction requiring EPA to withdraw the Group A designation and the underlying risk assessment. *Flue-Cured Tobacco Cooperative Stabilization Corporation, et al. v. EPA*, No. 6:93CV370 (U.S. District Court, Middle District, North Carolina) (filed June 22, 1993).

**SECURITIES AND EXCHANGE COMMISSION
(SEC)**

[11] Corporations Ordered to Include Antismoking Proposals in Proxy Materials

The staff of the Division of Corporation Finance of the SEC has reportedly refused to permit PepsiCo, Inc., and Philip Morris Companies Inc. to omit from proxy materials shareholder proposals regarding smoking issues. In so ruling, the staff rejected claims that the proposals were false and misleading.

PepsiCo sought to omit a proposal that would direct its board to adopt a smoke-free policy for its restaurants. PepsiCo challenged the proposal's reference to the EPA Risk Assessment on ETS, saying the proposal does not indicate "either the degree of exposure nor the length of time that an individual must be exposed to ETS in order for ETS to have a harmful effect." Such omissions, according to PepsiCo mislead the public to believe "that exposure to ETS in restaurants is of such a degree and frequency as to be a direct cause of cancer, while neglecting to state the cumulative effects of such exposure."

PepsiCo also reportedly argued that the proposal implies that the company does not provide a safe eating environment. In view of pending litigation, the SEC staff did not take a position on PepsiCo's argument that the proposal relates to ordinary

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business operations. See *BNA Securities Law Daily*, February 25, 1994.

The proposal involving Philip Morris reportedly asks the company to refrain from undermining legislation intended to restrict smoking in public places and to cease expenditures challenging studies on ETS. Counsel for Philip Morris apparently argued that the proposal was false and misleading in that it suggests that a lawsuit the company filed against the EPA is meritless in that it quotes from "carefully chosen (newspaper) editorials, which, by their nature express points of view rather than discuss facts." See *BNA Corporate Counsel Daily*, February 23, 1994.

STATE AND LOCAL GOVERNMENTS

- [12] *Mana's Foods, Inc., et al. v. Wade, et al.* (General Court of Justice, Superior Court Division, Guilford County, North Carolina) (filed October 29, 1993)

The Guilford County Board of Health filed a motion to dismiss this action in which eleven plaintiffs, including Lorillard Tobacco Company, are seeking to overturn the Board's "Environmental Tobacco Smoke Control Rules." However, the Board voted during a December 1993 meeting to suspend enforcement of the rules through November 1994, in order to give Guilford County public officials an opportunity to request a public county-wide referendum on the rules.

Because there is no statutory authority in North Carolina for such a referendum, the General Assembly would have to pass special legislation before one could be scheduled. According to a press report, officials of local governments in the county have not expressed any interest in calling for a referendum, and the Guilford Board of Commissioners has said it is unlikely that it will do so. Moreover, suits similar to the Guilford County case have been filed against health boards in Halifax and Wake Counties. A member of the Guilford County Board of Health has reportedly said that it would make little sense to reinstitute the smoking ban if the rules in Halifax are overturned. See *Greensboro News and Record*, February 20, 1994. Further details about the case appear in issue 59 of this Report, November 5, 1993.

The related complaints are *City of Roanoke Rapids, et al. v. Peedin, et al.*, No. 94-CVS-54 (General Court of

Justice, Superior Court Division, Halifax County, North Carolina) (filed January 14, 1994) and *The Angus Barn Ltd., et al. v. Sowter, et al.* (General Court of Justice, Superior Court Division, Wake County, North Carolina) (filed November 10, 1993). The smoking control rules enacted by the boards of health in those counties have been challenged on the grounds that the boards exceeded their authority in adopting the rules, the public notice regarding adoption of the rules was insufficient, and the rules violate the plaintiffs' constitutional rights of due process and equal protection. As in the Guilford County case, the plaintiffs are represented by Womble Carlyle Sandridge & Rice.

[13] Workplace Smoking Ban Proposed in Chicago

On February 9, 1994, the Chicago City Council introduced a antismoking ordinance that would ban smoking in all workplaces in the city and in open-air sports stadiums. It would also reportedly require that smokers stand at least five feet from the entrances of business establishments while they smoke.

The initial draft exempted restaurants, but a smoking opponent on the City Council apparently refined the proposed ordinance with a substitution, modeling it on the measure that took effect recently in San Francisco. The San Francisco measure permits smoking only in those sections of restaurants that are designated as a bar. Opposition to the proposal has reportedly come from the Illinois Restaurant Association, the Hotel-Motel Association of Illinois and City Council members who smoke.

In Chicago, smoking is already restricted to designated areas in most public places, in private businesses, and in taxicabs. Some 13 percent of the city's restaurants, 13 regional malls and more than 50 downtown office buildings have apparently imposed smoking bans on their own initiative. See *Chicago Sun-Times*, February 10, 1994; *Chicago Tribune*, February 27, 1994.

Meanwhile, a smoker in Chicago has apparently responded to the latest proposals by forming Citizens Against Unconstitutional Smoking Elimination (CAUSE). In a letter to the editor, smoker Kathy Posner is soliciting smokers to join her in opposing the proposed smoking ordinance. See *Chicago Sun-Times*, February 24, 1994.

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[14] Ohio State Employees Support Bill to Establish Smoking Areas

State employees and the operators of cafeterias located in state buildings in Ohio reportedly testified during legislative hearings in support of a bill that would require public buildings to have a designated smoking area. The bill, introduced by a Cleveland representative, would permit smoking in those buildings affected in 1993 by an executive order issued by Governor George Voinovich (R) banning smoking entirely in state buildings and state automobiles. According to the cafeteria operators who testified, they are losing business to nearby restaurants that permit smoking. See *United Press International*, February 24, 1994.

[15] Washington State Coalition Plans to Support Strict Smoking Laws

According to a press report, Tobacco Free Washington, a coalition of 200 organizations and 400 individuals in the State of Washington, has announced plans to lobby policymakers and government regulators to strengthen existing smoking laws and to create new laws that would restrict public exposure to ETS. The coalition will also apparently be conducting meetings and launching a public information campaign throughout the state aimed at reducing the level of smoking among teenagers. See *Business Wire*, February 23, 1994.

**ETS-RELATED LITIGATION AGAINST
CIGARETTE MANUFACTURERS**

[16] *Bluitt*: Proposed Revised Scheduling Order Submitted to the Court

On February 28, 1994, the parties submitted to the court a joint motion to enter a revised scheduling order and an agreed order granting plaintiffs leave to file an amended complaint. The proposed revised scheduling order, which has not been entered by the court, sets trial to begin during December 1995, requires plaintiffs to designate their expert witnesses and provide expert reports on March 1, 1995, directs defendants to designate their expert witnesses and provide expert reports on June 1, 1995, schedules discovery to close on August 31, 1995, and sets the final pre-trial conference for November 28, 1995. The court's February 1,

1994 scheduling order set a trial date of December 5, 1994, and set a number of other 1994 deadlines. The proposed revised scheduling order requires plaintiffs to file an amended complaint by March 31, 1994.

Plaintiffs in this action allege Willie Ruth Bluitt was a nonsmoker who died of lung cancer as a result of workplace exposure to environmental tobacco smoke. Defendants in the action are the six major U.S. cigarette manufacturers. *Bluitt v. R.J. Reynolds Tobacco Co., et al.* (U.S. District Court, Northern District, Texas) (filed August 30, 1993).

[17] *Broin*: Roundup of Deposition Activity

Defendants deposed plaintiff Donna O'Neil on February 22-23, 1994, and plaintiff Bland Lane on February 28-March 1. Defendants have deposed five of the plaintiffs to date. In addition to Ms. O'Neil and Ms. Lane, defendants deposed Patricia Crittenden on December 1-2, 1993, Yvonne Treasure on January 12, 1994, and Karen McNally on February 15-16, 1994.

Plaintiffs have deposed sixteen present or former officers or employees of the defendants. In alphabetical order, these individuals are:

- William Campbell, Philip Morris Inc.
- Samuel Chilcote, The Tobacco Institute
- Brennan Dawson, The Tobacco Institute
- Farrell Delman, Tobacco Merchants Association
- James Glenn, Council for Tobacco Research
- Thomas Lauria, The Tobacco Institute
- Bennett LeBow, Brooke Group, Limited
- Harmon McAllister, Council for Tobacco Research
- Ellen Merlo, Philip Morris USA
- Walker Merryman, The Tobacco Institute
- Martin Orlowsky, Lorillard Tobacco Co.
- Lawrence Ricciardi, RJR Nabisco Inc.
- Michael Rosenbaum, Brooke Group, Limited
- Arthur Stevens, Lorillard Tobacco Co.
- Andrew Tisch, Lorillard Tobacco Co.
- Laurence Tisch, Loews Corporation

At issue in this case are the claims of 28 flight attendants allegedly injured by occupational exposure to ETS. In addition, the husband of one of the flight attendants claims loss of consortium. The 28 attendants purport to represent a class of approximately 60,000 other attendants. Plaintiffs' class action allegations have been dismissed by the trial court; plaintiffs' appeal of that dismissal is pending in the Florida Court of Appeal.

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Injuries alleged by the putative class representatives include lung cancer, breast cancer and unspecified respiratory ailments. Plaintiffs further allege that occupational exposure to ETS on board aircraft causes at least 22 diseases and a reasonable fear of contracting such diseases. The defendants are the six major U.S. cigarette manufacturers (plus related entities), UST, Inc., United States Tobacco Company, Dosal Tobacco Corp., the Council for Tobacco Research, The Tobacco Institute, and three trade associations. *Broin, et al. v. Philip Morris, et al.* (Circuit Court, Dade County, Florida) (filed October 31, 1991).

[18] *Dunn*: Various Appellate Developments

On February 21, 1994, the defendants who have appealed the trial court's order denying their motion to transfer venue filed their brief in the Indiana Court of Appeals. Plaintiffs' brief in opposition is presently due on March 3.

On February 18, the non-manufacturing tobacco company defendants (American Brands, Liggett & Myers, Loews Corporation and RJR Nabisco Holdings Corporation) filed a petition for permission to file an interlocutory appeal from the trial court's order denying their motions to dismiss the complaint. They also seek from the Court of Appeals a stay of trial court proceedings against them until their appeal is resolved.

Plaintiffs in this case contend that Mildred Wiley was a nonsmoker who died of lung cancer as a result of workplace exposure to environmental tobacco smoke. Her husband, Philip Wiley, is also asserting a loss of consortium claim. Defendants in the case are each of the six major U.S. cigarette manufacturers, parent companies of some of the manufacturers, The Tobacco Institute, and the Council for Tobacco Research. *Dunn v. RJR Nabisco Holdings Corporation, et al.* (Superior Court, Delaware County, Indiana) (filed May 28, 1993).

[19] *Voth*: New Magistrate Judge Assigned; Several Developments Surrounding Plaintiff's Motion for Leave to File a Fourth Amended Complaint

The case has been assigned to Magistrate Judge John Cooney, and the motions that were scheduled to be submitted on Judge Jones' not-for-oral-argument calendar on February 22, 1994, were scheduled to be submitted on Magistrate Cooney's not-for-oral-argument calendar on February 28, 1994. To date, no rulings have been issued. Those motions included, (i) plaintiff's

motion for leave to file a third amended complaint, (ii) Philip Morris Companies' motion to dismiss plaintiff's second amended complaint for lack of jurisdiction, (iii) plaintiff's motion for a preliminary injunction (which seeks to ban the sale of cigarettes in Oregon), (iv) a motion for judgment on the pleadings filed by the defendants named in the second amended complaint who are not contesting jurisdiction, and (v) plaintiffs' motion to strike the motion for judgment on the pleadings.

The defendants named in plaintiff's second amended complaint have submitted individual responses to plaintiff's motion for leave to file a fourth amended complaint. In general terms, the defendants either asked the court not to allow the amended complaint to be filed because it is frivolous or renewed their dispositive motions to the second amended complaint. Plaintiff's proposed fourth amended complaint seeks to add several additional defendants, including the Mississippi distributors of cigarettes named as defendants in *Butler*. Plaintiff has not submitted any evidence that he resided in Mississippi or that the Mississippi distributors sold cigarettes to the Oregon prison system.

Frank Voth, who is incarcerated in the Oregon State Penitentiary, alleges that his civil rights have been violated as a result of his exposure to environmental tobacco smoke. He claims that he has "incurred permanent health damage and is at risk of death" as a result of being exposed to ETS. Defendants in *Voth* are Forsyth Tobacco Products, R.J. Reynolds, Brown & Williamson, Philip Morris Companies and American Tobacco. *Voth v. Forsyth Tobacco Products, et al.* (U.S. District Court, Oregon) (filed April 27, 1993).

ETS/IAQ LITIGATION NOT INVOLVING CIGARETTE MANUFACTURERS

FAST-FOOD RESTAURANTS

[20] *Texas v. McDonald's Corp.* (Travis County District Court, Texas) (filed February 16, 1994; dismissed February 25, 1994)

Texas Attorney General Dan Morales, who filed deceptive trade practices lawsuits against five fast-food restaurant chains, reportedly dismissed the action filed against McDonald's Corp. in light of the announcement made by McDonald's that it would ban smoking in its 1,400 corporate-owned restaurants. Morales alleges in the

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complaints that it is false and misleading to suggest to the public that it is protected from ETS when nonsmoking areas in restaurants are not separately ventilated. The lawsuits against Kentucky Fried Chicken, Taco Bell, Long John Silver's and Burger King are still pending. See *Reuters*, February 25, 1994. Details about the cases appear in issue 66 of this Report, February 18, 1994.

WORKPLACE: SMOKERS' RIGHTS

[21] *Sherer v. Access Graphics Inc.* (Boulder, Colorado) (unknown filing date)

According to a press report, a smoker has filed suit against a Boulder company claiming that he was fired because he was seen smoking at a mall during his lunch hour. Smoker Paul Sherer, hired by Access Graphics, Inc., in May 1993, said he learned of the company's smoke-free policy the day after he was hired and tried to quit, but resumed smoking three days after signing a document stating he understood the company policy. He says he has never smoked while on the job.

Sherer reportedly claims that the policy violates a Colorado law prohibiting employment discrimination against those who engage in lawful activities during nonworking hours. Sherer's attorney was quoted in the press report to say, "It's a civil rights kind of thing. Why should an employer be able to tell you what to do when you're not working for them."

According to a company spokesperson, Access Graphics refuses to hire smokers in order to control health-insurance costs. Sherer, who is suing for unspecified damages, is reportedly receiving full unemployment benefits following his termination from employment. A referee with the Division of Employment and Training apparently ruled on November 10, 1993, that Sherer "shall not be considered to be at fault for the job separation." See *Associated Press*, February 10, 1994.

PRISONER CASE

[22] *Schultz: Arizona Court of Appeals Affirms Judgment in Case Filed Against Tobacco Distributors*

On February 24, 1994, the Arizona Court of Appeals affirmed the judgment in favor of the defendants in the last pending case filed by Greg Schultz alleging exposure to environmental tobacco smoke. The defendants were two distributors of tobacco products, the State of Arizona,

and the Director of the Department of Corrections. The trial court dismissed plaintiff's complaint on a variety of grounds in August 1992. The court granted motions to quash service filed by the tobacco distributors, whom plaintiff attempted to join in a series of amended complaints. In addition, the trial court denied plaintiff's motion for leave to amend the complaint to add the tobacco distributors as defendants.

Schultz, who filed the case *pro se*, alleged he had several minor physical ailments due to his exposure to environmental tobacco smoke while incarcerated in an Arizona prison. Based on the certificate of service accompanying the February 24, 1994, decision by the Arizona Court of Appeals, it appears Mr. Schultz has been released from prison and is living in St. Louis, Missouri. No manufacturers of tobacco products were ever named as defendants in the instant action. *Schultz v. State of Arizona, et al.* (Arizona Court of Appeals) (filed May 21, 1991).

TOXIC CHEMICAL WARNINGS

[23] *Environmental Defense Fund v. Parks Corp.*, No. 941241 (Superior Court, San Francisco County, California) (unknown filing date)

Trial was reportedly scheduled to begin the week of February 14, 1994, in a case involving a constitutional challenge to California's Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65). The Environmental Defense Fund (EDF), a nonprofit group based in Oakland, California, reportedly instituted suit against more than 20 defendants, claiming that a lack of warnings about the toxic substances in their products constituted a violation of Proposition 65. Most of the defendants settled or changed their products. Under Proposition 65, the EDF would be entitled to receive up to 25 percent of any statutory penalties imposed in such a lawsuit.

The only defendant remaining in the case, Parks Corp., apparently manufactures paint strippers containing methylene chloride, a substance listed by the state as a carcinogen since 1988. Parks Corp. is reportedly challenging the suit on statute of limitations grounds and on the ground that Proposition 65 is unconstitutional. The trial court was expected to rule on the asserted defenses prior to trial. According to a press report, if a jury were to be

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empaneled in the case, it would mark the first time a Proposition 65 case reached trial. See *Mealey's Litigation Reports*, February 17, 1994.

OTHER DEVELOPMENTS

[24] McDonald's Announces Smoking Ban in Company-Owned Restaurants

On February 23, 1994, McDonald's Corporation announced that it was initiating a smoking ban in the more than 1,400 restaurants it owns. Eighty percent of the 9,100 McDonald's fast-food establishments are locally owned by franchisees; although these restaurants are not directly affected by the company ban, McDonald's said it would encourage its franchises to ban smoking as well. *The Houston Chronicle*, February 26, 1994.

McDonald's tested a smoke-free policy more than a year ago, and claims that by the end of 1993, more than 2,200 individual restaurants had voluntarily banned smoking.

Meanwhile, the New York Area Office of White Castle has reportedly announced it will ban smoking in its 40 New York area restaurants effective March 14, 1994. The restaurant said changes in "government regulations" and in customers' eating habits caused them to evaluate their smoking policy. White Castle restaurants in Chicago and Cincinnati have reportedly already established a smoke-free policy. See *PR Newswire*, February 14, 1994.

MEDIA COVERAGE

[25] "Practical Traveler: Airlines Douse More Cigarettes," B. Wade, *The New York Times*, February 20, 1994

This article details the smoking policies that have been adopted by airlines around the world. The author also discusses the negotiations that are currently underway between the United States, Canada, Australia and New Zealand to enter an agreement that would ban smoking on all flights crossing the Pacific Ocean. According to a spokesperson for the United States Department of Transportation (DOT), such an

agreement could be entered without the need for enabling legislation as DOT believes it has the power to expand the nonsmoking provisions of its existing rule regarding smoking on domestic flights.

According to the author, the greatest resistance to smoking bans on airlines comes from the British and the Japanese. Although a limited number of flights to and from the United Kingdom are smoke free, apparently, no airline is willing to adopt such policies on flights to Japan. U.S. Air evidently has no plans to ban smoking on flights to Europe; there is apparently more demand than can be accommodated in designated smoking sections.

SCIENTIFIC/TECHNICAL ITEMS

LUNG CANCER

[26] Letters to the Editor Regarding "Smoke and Letters," D. Rennie, *Journal of the American Medical Association* 270(14): 1742-1743, 1993

In response to letters by tobacco industry personnel or consultants concerning the Trichopoulos, et al., autopsy study, Drummond Rennie, Deputy Editor (West) of the *Journal of the American Medical Association (JAMA)*, wrote an editorial on the role of the editor in evaluating letters for publication. Further details on the study appear in issues 32 and 58 of this Report, October 9, 1992, and October 22, 1993. *JAMA* recently published a letter by Ronald M. Davis and Simon Chapman concerning Rennie's editorial and a reply from Rennie. The letters appear at 271(8): 583-584, 1994.

Davis and Chapman, respectively editor and deputy editor of the journal *Tobacco Control*, suggest that journal editors should treat letters as they would treat research papers. Namely, they suggest that "certain letters" should be sent to outside experts for peer review. Davis and Chapman suggest that candidate letters would be those that present new data or analyses, or those written by a "party with vested interests in the position being taken." While Davis and Chapman claim to agree with Rennie's position that journals should allow discussion of controversial issues,

they go on to state that "many (or most) of the letters written, generated, or otherwise paid for by the tobacco industry are characterized by poorly informed, misleading, or downright silly arguments." They also suggest that "many (or most) of these correspondents are attempting to exploit scientific journals."

In his reply, Rennie opines that "[q]uality is hard to define." He suggests that even expert reviewers can "differ strenuously" on this issue. Rennie states that his decision to publish the letters from industry consultants or personnel did not mean that he was convinced by them or agreed with their arguments. He continues: "I did not endorse the letters, indeed, I was unimpressed by them, but I thought they were rational and of sufficient quality to publish." Rennie concludes with the observation that having the opportunity for review and rebuttal of every letter sent to the *JAMA* would be "ponderous, time-consuming, complicated, redundant, and crushing to criticism."

[27] Letters to the Editor Regarding "Involuntary Smoking in the Restaurant Workplace: A Review of Employee Exposure and Health Effects," M. Siegel, *Journal of the American Medical Association* 270(4): 490-493, 1993

JAMA recently published two letters concerning a review by Siegel, which purported to show that ETS exposures were greater in restaurants than in homes, and that this correlated with an increased risk of lung cancer reported for waiters. See issue 53 of this Report, August 6, 1993, for the original article and an editorial. A letter by Gray Robertson in response to the Siegel claims, and a reply by Siegel were published. The letters appear at *JAMA* 271(8): 584-585, 1994.

Gray Robertson comments that Siegel's calculation of airborne nicotine concentrations, based on a literature review, "confirms the accuracy" of nicotine levels measured by Robertson and colleagues and presented at a tobacco-industry-sponsored press conference in 1988. He then describes the paper as claiming that since waiters reportedly have a 1.5 times higher probability of developing lung cancer and that ETS levels (based on nicotine) are about 1.6 times higher in restaurants than in homes, ETS "must be" related to the development of lung cancer. Robertson calls this "nonsense." He also questions Siegel's objectivity. Robertson comments that results reported by tobacco-industry-funded researchers are "accorded no

credence," and suggests that when similar results are reported by a someone in public health and "given an alarmist spin," they are not questioned.

In his reply, Siegel states that Robertson's letter provides "valuable support" for his conclusion that ETS exposure is increased among restaurant workers. Siegel disagrees with Robertson's assessment of how he arrived at his conclusion, stating that he had reviewed "possible explanations" of the reported increased risk for lung cancer among food service workers, and concluded that ETS was the only "environmental exposure" that could account for the reported risk. Siegel also suggests that the "cigarette equivalent" approach to estimating nicotine exposure used by Robertson could be replaced by a new method for calculating "risk from involuntary smoking" using nicotine. Citing a recent paper by Repace and Lowrey, Siegel claims that ETS is associated with a seven in 1,000 lifetime risk of lung cancer. See issue 57 of this Report, October 8, 1993.

RESPIRATORY DISEASES AND CONDITIONS – CHILDREN

[28] "Passive Smoking as a Determinant of Bronchial Responsiveness in Children," F. Forastiere, N. Agabiti, G.M. Corbo, R. Pistelli, V. Dell'Orco, G. Ciappi and C.A. Perucci, *American Journal of Respiratory and Critical Care Medicine* 149: 365-370, 1994 [See Appendix A]

These Italian researchers report that bronchial responsiveness was affected in children (particularly girls) exposed to high levels of ETS at home. They suggest that their data support an association between ETS exposure and the development of asthma.

OTHER HEALTH ISSUES

[29] "Passive Smoking During Pregnancy and the Risk of Delivering a Small-for-Gestational-Age Infant," I. Fortier, S. Marcoux, and J. Brisson, *American Journal of Epidemiology* 139(3): 294-301, 1994 [See Appendix A]

This study reports no statistically significant associations between home or workplace ETS exposure and the risk of having an infant with lower than expected birth weight.

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- [30] "Environmental Tobacco Smoke: The Risks of Passive Smoking in Facial Surgery," A. Matarasso, *Annals of Plastic Surgery* 31: 573, 1993 [See Appendix A]

In this letter to the editor, the author suggests, based on one case study, that ETS exposure could adversely influence the healing process following facial surgery.

- [31] "Intellectual Impairment in Children of Women Who Smoke Cigarettes During Pregnancy," D.L. Olds, C.R. Henderson, and R. Tatelbaum, *Pediatrics* 93: 221-227, 1994 [See Appendix A]

Although this paper focuses on maternal *active* smoking during pregnancy, the authors report that smoking by the mother approximately four years after the child's birth was associated with a three-point difference (not statistically significant, however) in the IQ scores of children of smoking mothers compared to children of nonsmokers.

ETS EXPOSURE AND MONITORING

- [32] "Passive Exposure to Tobacco Smoke in Children Aged 5-7 Years: Individual, Family, and Community Factors," D.G. Cook, P.H. Whincup, M.J. Jarvis, D.P. Strachan, O. Papacosta, and A. Bryant, *British Medical Journal* 308: 384-389, 1994 [See Appendix A]

Using data on parental smoking and saliva cotinine measurements collected from English and Welsh children, the authors report that maternal smoking was most related to cotinine level, even though fathers reported smoking more cigarettes. The authors also reported a statistical correlation between cotinine levels in children not exposed at home and the prevalence of smoking in the community.

- [33] "Hair Concentrations of Nicotine and Cotinine in Women and Their Newborn Infants," C. Eliopoulos, J. Klein, M.K. Phan, B. Knie, M. Greenwald, D. Chitayat, and G. Koren, *Journal of the American Medical Association* 271(8): 621-623, 1994 [See Appendix A]

The authors of this study report that measurements of nicotine and cotinine in the hair of "passive smoking"

mothers and their infants were intermediate between measurements from active smoking women and non-smoking women. This study expands on data reported previously in a preliminary report. See issues 53 and 55 of this Report, August 6 and September 10, 1993.

- [34] "Reduced Plasma Ascorbic Acid Concentrations in Nonsmokers Regularly Exposed to Environmental Tobacco Smoke," D.L. Tribble, L.J. Giuliano, and S.P. Fortmann, *American Journal of Clinical Nutrition* 58: 886-890, 1993 [See Appendix A]

The authors claim to present data supporting lower levels of plasma ascorbic acid, a claimed antioxidant and "anticarcinogen," in persons exposed to ETS. A similar result had been reported previously for smokers.

STATISTICS AND RISK ASSESSMENT

- [35] "Sponsored Symposia on Environmental Tobacco Smoke," L.A. Bero, A. Galbraith, and D. Rennie, *Journal of the American Medical Association* 271(8): 612-617, 1994 [See Appendix A]

Based on a review of symposium proceedings on ETS and articles on ETS published in the peer-reviewed literature, and a comparison of authors appearing in the symposia and in the 1986 Surgeon General's and National Research Council Reports on ETS, the authors conclude that symposium articles were more likely to support the position that purported health effects of ETS have not been conclusively established. Moreover, they suggest that tobacco industry funding and affiliations were more common among the symposium contributors. The authors suggest that an evaluation of the reliability of symposium articles should be undertaken by the court in the recently-filed suit against the EPA.

IN EUROPE & AROUND THE WORLD

LEGISLATIVE AND REGULATORY MATTERS

AUSTRALIA

[36] Action on Canberra Legislation is Postponed

Consideration by the Canberra Legislative Assembly of the proposed Smoke Free Areas Bill had reportedly been postponed for several months. The measure, which has been hotly debated over the last several weeks, would ban smoking in restaurants while exempting bars in hotels, clubs and taverns from the restrictions. The measure would also prohibit smoking in child care centers, medical facilities and shopping centers.

The Assembly apparently opted to refer the measure to the Assembly Environment Committee. That committee is headed by MLA Dennis Stevenson, who reportedly said he plans to conduct a survey asking Canberrans if smoking should be banned in restaurants and other places. He was quoted to say, "I'm a bit of a maverick member. I actually vote according to what the electorate wants." He said he expected the survey to be completed by February 20, 1994. See *Sydney Morning Herald*, February 19, 1994, and *Canberra Times*, February 18, 1994.

CANADA

[37] Ontario Tobacco Control Act Scheduled for Clause-by-Clause Review

On March 7, 1994, a committee of the Ontario Legislature is scheduled to begin a clause-by-clause review of the Tobacco Control Act (Bill 119). The bill would restrict smoking in a number of public places, including colleges and universities, schools, day nurseries, retail stores, hair salons and laundromats. It also would outlaw cigarette sales to anyone younger than 19 and ban the sale of tobacco in pharmacies and other health facilities.

Antismoking activists are recommending that the measure be amended to include a province-wide ban on smoking in workplaces and public places. Another proposed amendment would require plain packaging for all tobacco products.

A third and final reading of Bill 119 is anticipated in the spring.

Meanwhile, in Ontario's capital city, Toronto, the health department sponsored a survey to measure the impact of a 1993 regulation that banned smoking in non-restaurant workplaces and public indoor areas not equipped with separately ventilated rooms. The health department reported that 83 percent of the employers responding to the survey had made their workplaces smoke free within three months after the regulation took effect.

As for restaurants, the regulation requires them to designate 50 percent of their space nonsmoking and to post warning signs about the alleged health effects of tobacco smoke. The survey reported that only four percent of the restaurants responding to the survey had voluntarily exceeded the regulations requirements by prohibiting smoking.

See *The Toronto Star*, February 15, 22 and 27, 1994, and *Canada NewsWire*, February 22, 1994.

REPUBLIC OF IRELAND

[38] Health Minister Plans to Announce Antismoking Proposal

Ireland's Minister for Health has reportedly announced that legislation to further restrict smoking in public places is to be introduced. He said he is currently reviewing existing smoking regulations and will soon announce his proposal. He was quoted in a press report to say, "The new regulations will reinforce the existing prohibition on smoking in places to which the public have access." The comments were apparently made at the launch of the 1994 Daffodil Day campaign, sponsored as a fundraising event by the Irish Cancer Society. See *The Irish Times*, February 22, 1994.

ISRAEL

[39] Government Passes Workplace Smoking Policy

On February 14, 1994, the Israeli government passed a measure that would restrict smoking in the workplace to designated areas. There is reported debate regarding whether the measure needs the signature of Prime and acting Health Minister Yitzhak Rabin before becoming law. Rabin, a smoker, has stated publicly, "They say

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that this new ruling has no validity if the health minister does not sign it. I am now the health minister. I don't know if I'll sign it." Other health officials reportedly say Rabin was only "joking," and that his signature is only a "formality."

Government officials say that once the law goes into effect, they will give advice to employers on designating smoking areas and establishing smoking cessation courses. See *Jerusalem Post*, February 15, 1994, and *The Gazette* (Montreal), February 20, 1994.

THAILAND

[40] Nonsmokers Protection Act to be Enforced

The Thailand government has reportedly begun enforcement of its Nonsmokers Health Protection Act according to the Deputy Public Health Minister. The law has had a year-long phase-in period and requires designated smoking areas be set aside in such places as restaurants, schools, hotels and shopping centers. Ministry and police department officials will begin imposing fines of up to 10,000 baht (US\$400) for owners of public facilities and up to 20,000 baht (US\$800) for other violators. See *United Press International*, February 19, 1994; *Bangkok Post*, February 17, 1994.

UNITED KINGDOM

[41] Labour Party Announces "Health 2000" Report; Pub Owners Object to its Proposed Smoking Restrictions

The opposition Labour Party has unveiled its blueprint for improving public health in a report called "Health 2000." According to the report, a future Labour government would outlaw smoking in "confined public places" and extend to all employees "the right to a smoke-free workplace," according to a newspaper report. The report also supports a ban on tobacco advertising.

The report's primary target for reform is the National Health Service. "Health 2000" recommends phasing out private beds in National Health Service hospitals, abolishing tax relief on private health insurance and imposing a levy for private treatment.

The report's proposals for restricting smoking met immediate opposition from pub owners. The chief

executive of the Federation of Licensed Victuallers warned that hundreds of pubs would be bankrupted if they had to ban smoking. "Non-smoking pubs have failed in the past and legislation will simply close them down," the executive was quoted as saying. See *Times*, February 11, 1994 and *Morning Advertiser*, February 21, 1994.

OTHER DEVELOPMENTS

CANADA

[42] McDonald's Announces It Will Become Smoke Free

Coinciding with the announcement of McDonald's fast-food restaurants in the United States, McDonald's Restaurants of Canada Limited announced on February 23, 1994, its 253 company-operated restaurants will become smoke free by March 7, 1994. A McDonald's spokesperson was quoted in media reports to say, "We made this move because we believe it is the right thing to do for our customers and our employees." The spokesperson also said that many of their individual franchisees have agreed to ban smoking in the near future. See *Canada NewsWire*, February 23, 1994, and *The Gazette* (Montreal), February 26, 1994.

GERMANY

[43] Specialists Encourage Public Smoking Laws

According to a press report, German heart and cancer specialists say that approximately 400 Germans die of lung cancer from exposure to ETS every year and that many more allegedly suffer other health problems, including heart disease. Professors from the German Heart Foundation and cancer research groups also say that the evidence of the claimed dangers of ETS exposure are indisputable and there should be legal curbs on smoking in public places. The group reportedly sent a letter to members of parliament encouraging them to draft a smoking restriction law, saying, "The number of people whose heart blood vessels are damaged or whose lung function is seriously impaired through passive smoking, especially children, old people and the sick, is certainly well above the number of cancer deaths." See *Reuters, Limited*, February 23, 1994.

APPENDIX A

The numbers assigned to the following article summaries correspond with the numbers assigned to the synopses of the articles in the text of this Report.

RESPIRATORY DISEASES AND CONDITIONS — CHILDREN

- [28] "Passive Smoking as a Determinant of Bronchial Responsiveness in Children," F. Forastiere, N. Agabiti, G.M. Corbo, R. Pistelli, V. Dell'Orco, G. Ciappi and C.A. Perucci, *American Journal of Respiratory and Critical Care Medicine* 149: 365-370, 1994

"The present study was...designed to clarify the effects of parental smoking on the degree of nonspecific bronchial responsiveness in children; factors that may reflect the child's level of exposure to environmental tobacco smoke were also considered."

"There were 825 children exposed to any parental smoke; in this group, in 14.4% only the mother smoked, in 49.0% only the father smoked, and in 36.6% both were smokers...A low level of father's education was more prevalent among the group of subjects exposed to parental smoking, but no other differences were noteworthy."

"As in the larger data set, in the subsample maternal smoking was related to increased risk of asthma (OR 1.48, 95% CI 0.84 to 2.65) and cough or phlegm (OR 1.75, 95% CI 0.87 to 3.56), even though in this case the associations were not statistically significant. Sex-, height-, and age-adjusted FEV₁ and FEF₂₅₋₇₅ were lower among subjects with passive smoking exposure in comparison with nonexposed individuals."

"In boys, there was no statistically significant increased risk in the categories studied, even though nonsignificant elevated odds ratios were found for both maternal and paternal smoking among those living in high-density households."

"For girls, both maternal and paternal smoking had a deleterious effect; statistically significant higher odds ratios were found for all responders (any smokers, OR 1.50; maternal smoking, OR 1.58) and for strong responders (any smokers, OR 2.70; maternal smoking, OR 2.92; paternal smoking, OR 2.59)."

"Gender, however, appears to modify the effect of passive smoking on BR in our study. Females had a greater frequency of response to methacholine than males when exposed to parental smoking."

"The simplest explanation for our results in girls is that they spend more time at home and are more exposed. An alternative possibility is that girls are more susceptible."

"The mechanism by which passive smoking can affect BR is unclear. Side-stream tobacco smoke, because of its complex chemical nature, may elicit an irritant effect involving parasympathetic receptors and a local inflammatory response of the bronchial tree, thus directly increasing BR; however, other pathways have been hypothesized."

"In conclusion, we suggest that the effects of parental smoking on children's BR are detectable when the conditions for a higher exposure level at home are met. Females seem to be more susceptible. The findings reinforce the evidence of an association between passive smoking and inception of bronchial asthma."

OTHER HEALTH ISSUES

- [29] "Passive Smoking During Pregnancy and the Risk of Delivering a Small-for-Gestational-Age Infant," I. Fortier, S. Marcoux, and J. Brisson, *American Journal of Epidemiology* 139(3): 294-301, 1994

"The objective of our analysis was to further assess the relation between maternal passive smoking during pregnancy and the risk of delivering a small-for-gestational-age (SGA) infant. We attempted to overcome some of the limitations of the previous studies in the following ways: our exposure data pertain to passive smoking at home and in the workplace, the associations are described for each surrounding separately, the analysis controls for all known confounders, including selected job characteristics, and the dose-response relation between passive smoking and the risk of SGA is also assessed."

"Among nonsmokers, 49 percent were exposed to environmental tobacco smoke, either at home only (13

percent), at work only (28 percent), or in both surroundings (8 percent)...Passive smokers included a larger proportion of nulliparae and tended to have higher caffeine intakes than other nonsmokers. Among women who had a paid occupation, passive smokers were more likely to work on evenings or nights and to have jobs involving lifting or long standing periods than unexposed women."

"Overall, nonsmokers passively exposed to tobacco smoke were at little or no higher risk of delivering a SGA infant (OR = 1.09, 95 percent confidence interval (CI) 0.85-1.39) than unexposed women. Passive smoking at home only was not related to SGA (OR = 0.98). . . . [B]eing passively exposed at work only yielded an adjusted odds ratio of 1.18 (95 percent CI 0.90-1.56). The relation between SGA and passive smoking at work only was further examined. The risks of SGA increased slightly but consistently when the weekly hours of exposure, the number of weeks of exposure during pregnancy, and the subjective intensity of exposure increased. However, none of the trends was statistically significant."

"We observed a modest increase in the risk of delivering a SGA infant in pregnant nonsmoking mothers exposed to passive smoking in the workplace. The point estimates increased consistently with the duration and the intensity of exposure, which supports the hypothesis that passive smoking during pregnancy may affect fetal growth. However, our results need to be interpreted with caution because the associations are weak, the confidence intervals all include null values, the tests for trends are not conclusive, and the association is not found in women exposed to smokers at home only."

"[T]he exposure may indeed be more important in the workplace than at home since the number of smokers and the environmental conditions (e.g., ventilation, room size, insulation) may differ in these two surroundings...[A]s the measure used to assess exposure at home (smoking habit of family members) differs from that used to assess exposure at work (hours of exposure), results may not be comparable. . . . [S]moking habit of family members is thought to be a less accurate measure than is the duration of exposure. If so, the associations with passive smoking at home would be more likely to be underestimated due to misclassification."

"Given the difficulty of documenting small effects in epidemiologic studies, in our view, future investigations are not likely to clarify the relation of passive smoking to SGA unless they are restricted to non-smokers, are based on large prospective cohorts, document exposure in the several possible environments and in different periods of pregnancy, and include a biologic marker of exposure as a supplement to detailed questionnaire data."

[30] "Environmental Tobacco Smoke: The Risks of Passive Smoking in Facial Surgery," A. Matarasso, *Annals of Plastic Surgery* 31: 573, 1993

"In plastic surgery, the harmful effects of *primary* cigarette smoking...following surgery and during wound healing have been well documented...What has not been subject to review are the effects of *passive smoking*. One could extrapolate from what is already known about passive smoking and its effects on patients to speculate on instances of exposure to environmental tobacco smoke (ETS) and to take similar, necessary precautions."

"A couple that had been together for 44 years — living and working — recently underwent facial rejuvenation surgery on the same day. The husband's cigarette use consisted of more than 100 packs per year....In the early postoperative period, [the nonsmoking wife] experienced areas of skin ischemia, resulting in superficial epidermolysis and pigmentary changes."

"Environmental tobacco smoke results in involuntary exposure derived from 'mainstream' and 'sidestream' smoke...Although the observations here are anecdotal and wound healing is a multifactorial process, in view of what has been clearly established regarding the adverse effects of primary cigarette smoking, the preponderance of evidence suggests that it is advisable to consider ETS as a possible deleterious factor. When screening patients and operating, the effect of ETS on delayed wound healing or tissue necrosis may in fact be an additional risk factor that can confound procedures that necessitate mobilization of flaps, and should not be underestimated."

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- [31] "Intellectual Impairment in Children of Women Who Smoke Cigarettes During Pregnancy," D.L. Olds, C.R. Henderson, and R. Tatelbaum, *Pediatrics* 93: 221-227, 1994

"In the current paper we examine whether the relationship between maternal prenatal cigarette smoking and children's intellectual impairment during the first 4 years of life remains after controlling for a wide range of potentially confounding influences."

"Interviews with the mother were conducted at registration during pregnancy, at the 34th week of gestation, and at 6, 10, 22, 34, and 46 months of the child's life."

"When smoking was defined by level of postnatal (46-month) smoking, the adjusted difference in children's IQs (averaged across 3 and 4 years of age) between those whose mothers smoked 0 and those whose mothers smoked 10+ cigarettes per day was 3.09 points (95% CI: - 0.93, 7.11)...[T]he greatest difference in children's intellectual functioning was found for cigarette smoking measured at the end of pregnancy."

"Children born to women who smoked heavily during pregnancy (10+ cigarettes per day), and who did not receive nurse-visitation services, had IQ scores at 1 and 2 years of age that were nearly 7 points lower, and at 36 and 48 months that were 9 points lower than children born to women who did not smoke during pregnancy. These differences were explained in part by associated differences in social class, maternal education, IQ, qualities of caregiving, and conditions in the home environment. Even after control for these biasing influences, however, a significant difference of 4.35 IQ points remained at 3 and 4 years between the children of women who smoked substantially versus those who did not smoke at all during pregnancy. This four-point effect, although small, is comparable with the adverse influence of low levels of lead exposure on preschoolers' IQ test performance where the children do not show symptoms of lead encephalopathy."

"[W]e did not assess fully the child's exposure to side-stream smoke during the first 4 years after delivery. It is revealing, nevertheless, that maternal post partum smoking was less predictive of the children's intellectual development than was prenatal smoking. We assume that a substantial portion of the

children's exposure to passive smoke is likely to come from the mother, and that where the mother smokes other individuals in the household also are likely to smoke. Clearly, more work needs to be performed on this topic, using more valid and reliable measures of passive smoking."

"Moreover, it is clear that women who smoked 10+ cigarettes per day were substantially different from those who did not smoke at all. It is possible that we did not measure all possible confounders and that some other unidentified variable accounts for the differences in children's IQs associated with maternal prenatal smoking levels."

ETS EXPOSURE AND MONITORING

- [32] "Passive Exposure to Tobacco Smoke in Children Aged 5-7 Years: Individual, Family, and Community Factors," D.G. Cook, P.H. Whincup, M.J. Jarvis, D.P. Strachan, O. Papacosta, and A. Bryant, *British Medical Journal* 308: 384-389, 1994

"We present an analysis of the relation between cotinine concentration and questionnaire data in children aged 5-7 from 10 towns in England and Wales. We examine the importance of parental exposure as opposed to other sources; exposure among children from non-smoking households; and the social and geographical pattern of passive exposure to tobacco smoke in children."

"The study was carried out in 10 towns in England and Wales — five with high adult cardiovascular mortality and five with low mortality."

"Fifty three percent (1610/4030) of children were exposed to at least one smoker."

"Geometric mean cotinine concentration varied greatly with source of exposure from 0.29 ng/ml in children with no identified source of exposure to 4.05 ng/ml when both parents smoked, a 13.7 fold increase. In the 20 children in whom both parents smoked more than 20 cigarettes a day the geometric mean cotinine was 9.03 ng/ml (95% confidence interval 6.73 to 12.1)."

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"Our data confirm that parental smoking is the most important source of passive exposure to smoke in young children and show a clear dose response with number of cigarettes smoked a day. While mothers were less likely to smoke than fathers, the effect on cotinine concentrations when they did so was greater, presumably because they spend more time with the children. The difference in effect was small at low levels of smoking, but pronounced at higher levels. One interpretation is that fathers who smoke heavily are less likely to do so in the presence of the child than mothers who smoke heavily. Overall, maternal smoking contributed more to the children's burden of cotinine than did paternal smoking. Other people smoking in the household and being looked after by someone from outside the household who smoked also made small contributions to exposure. However, such sources of exposure were relatively uncommon and when present were less important than parental smoking."

"[N]icotine is not entirely specific to tobacco. It is also found in small amounts in peppers, aubergines, and potato skins. We have previously argued that these are unlikely to greatly influence cotinine concentration. The uniformly low concentrations among our non-exposed children suggest that either the higher concentrations seen in the exposed children are due to smoking or the dietary factors are almost entirely confounded with smoke exposure in the home, which seems implausible. Even among our non-exposed children the concentrations of cotinine correlate with community smoking habits, which suggests that any other sources of cotinine make only a very small contribution."

"The social class and geographical differences in cotinine concentrations emphasize the variation in passive exposure to tobacco smoke among children from different backgrounds."

"Though the identified sources of exposure were the most important determinants of variation in cotinine concentrations, other sources and modifying factors clearly existed. Eighty eight percent of children not exposed at home and not looked after by a smoker had cotinine detected in their saliva. Cotinine concentration in non-exposed children was related to both social class and town of residence and was presumably attributable to sources we did not inquire about. This

is supported by the finding that the cotinine concentrations in non-exposed children were directly related to the community level of smoking."

"7-11% of the population burden of cotinine was in children not exposed to any of the sources we asked about. The correlation between cotinine concentrations in such children and the prevalence of smoking in the community suggests that passive smoking should be viewed as a community exposure rather than simply as an aspect of family lifestyle."

[33] "Hair Concentrations of Nicotine and Cotinine in Women and Their Newborn Infants," C. Eliopoulos, J. Klein, M.K. Phan, B. Knie, M. Greenwald, D. Chitayat, and G. Koren, *Journal of the American Medical Association* 271(8): 621-623, 1994

"In the present study we describe the distribution characteristics of nicotine and its major metabolite, cotinine, in maternal and neonatal hair. These data suggest that accumulation of nicotine and cotinine in neonatal hair may be used clinically and in laboratory studies to estimate fetal exposure to maternal cigarette smoking."

"Mothers who were active smokers, passive smokers, or nonsmokers were identified in two newborn nurseries in Toronto, Ontario, 1 to 3 days after delivery. . . . Passive smoking was defined as regular and steady gestational exposure to other persons' cigarette smoke, either at home (eg, smoking by husband or partner) or in the workplace. Hair samples were obtained by cutting five to seven hair shafts."

"Thirty-five nonsmoking mothers participated in the study. Their mean hair concentrations of nicotine and cotinine were significantly lower than in smoking mothers. Similarly, neonatal hair concentrations of nicotine and cotinine were significantly lower in infants of nonsmokers than in infants of smokers."

"Twenty-three passive smoking mothers and their infants participated in the study. Their concentrations of nicotine and cotinine were intermediate and significantly different from those of both the smokers and nonsmokers."

"[O]ur results suggest that maternal and fetal hair may better estimate long-term systemic exposure to the

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toxic constituents of cigarettes than the reported consumed dose and thus may yield a better prediction of fetal/neonatal risk."

"During the last few years there has been increasing awareness of the serious health risks inflicted by passive exposure to cigarette smoke. In a recent study, Makin et al. documented impaired neurodevelopment in infants exposed in utero to passive maternal smoking compared with nonsmoking controls. Analysis of such data is complicated because of the potential confounding variables in assessing toddler achievements in cognitive tests; however, these researchers controlled for known confounders in their model. On the other hand, the degree of fetal exposure to cigarette smoke could not be evaluated in the absence of a biological marker. Our data indicate that, indeed, passive smoking pregnant women and their infants accumulate nicotine and cotinine to measurable levels. These data confirm our preliminary findings in four passive smokers who were initially included in a group of nonsmokers. Because hair accumulation of cotinine reflects long-term exposure, it may provide a more accurate determination of fetal exposure to cigarette smoke than the reported number of cigarettes consumed."

[34] "Reduced Plasma Ascorbic Acid Concentrations in Nonsmokers Regularly Exposed to Environmental Tobacco Smoke," D.L. Tribble, L.J. Giuliano, and S.P. Fortmann, *American Journal of Clinical Nutrition* 58: 886-890, 1993

"Radical-mediated oxidative processes have been implicated in the pathogenesis of chronic and degenerative diseases including cancer and atherosclerotic heart disease....Smokers exhibit reduced concentrations of the antioxidant vitamin ascorbic acid (AA)."

"Environmental tobacco smoke (ETS) is now recognized to predispose exposed individuals to the development of chronic diseases, although little is known about the nature and magnitude of the pathophysiological effects of ETS exposure, or the degree to which these may contribute to increased disease risk. Sidestream smoke contains a greater oxidant load than mainstream smoke and high

ambient concentrations of oxidants are likely to be present in inadequately ventilated homes, workplaces, and other enclosed settings where smoking is permitted. We hypothesized that nonsmokers regularly exposed to such conditions were chronically oxidatively stressed and thus would exhibit aberrations in AA nutriture similar to smokers. To examine this possibility we compared plasma AA concentrations and vitamin C intakes in a cross-sectional sample of women classified as either active heavy smokers (AS), regular passive smokers (PS), or nonexposed nonsmokers (NNS)."

"Our results confirm previous reports of reduced plasma AA concentrations in AS and additionally show that PS exhibit reduced concentrations relative to NNS."

"In contrast to observations of decreased vitamin C consumption in smokers, we did not observe decreased vitamin C intakes in smoke-exposed populations relative to NNS."

"Reduced plasma AA concentrations were apparent even in AS reporting dietary vitamin C intakes exceeding current recommended dietary allowances (RDAs) for smokers. These data support previous contentions that dispute the recent increase to 100 mg vitamin C/d, the RDA is still inadequate for smokers...Our results additionally suggest that current vitamin C intake recommendations are inadequate to meet the increased needs of nonsmokers regularly exposed to ETS. Plasma AA concentrations were reduced in PS reporting vitamin C intakes up to 250 mg/d, but not at higher intakes."

"In summary, we observed reduced plasma AA concentrations in AS and PS relative to NNS that were not attributable to differences in vitamin C intakes among these populations. These results suggest that, like AS, PS are subjected to severe oxidant exposure. Oxidative mechanisms have been implicated in numerous chronic and degenerative diseases and thus may be involved in the increased risk associated with ETS exposure. Although reductions in plasma AA concentrations in PS may be overcome at higher vitamin C intakes, this is unlikely to completely ameliorate the pathogenic consequences of the underlying oxidant pressure."

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STATISTICS AND RISK ASSESSMENT

- [35] "Sponsored Symposia on Environmental Tobacco Smoke," L.A. Bero, A. Galbraith, and D. Rennie, *Journal of the American Medical Association* 271(8): 612-617, 1994

"To suggest substantial support for their position that ETS is not harmful, the tobacco industry frequently cites industry-funded, non-peer-reviewed publications, such as symposium proceedings. This study examines symposia on ETS to determine whether they should be considered equivalent to other sources of scientific information on ETS. This study was designed to examine the extent of tobacco industry sponsorship of symposia on ETS; to see whether there was a balanced presentation of the data on ETS in such symposia compared with articles on ETS in the peer-reviewed literature; to test whether these symposia represented the work of tobacco industry-sponsored scientists relatively more than did articles on ETS in the peer-reviewed journals; and to compare the symposium authors and their sponsorship with the authors of two scientific consensus documents that concluded that ETS exposure is harmful to health. In short, this study gauges the number, sponsorship, authorship, and quality of symposia on ETS."

"We identified 11 symposia on the topic of ETS; four of these explicitly acknowledged tobacco industry funding. Although seven symposia did not acknowledge industry sponsorship, at least two of these were organized by individuals who are affiliated with the tobacco industry."

"Fifty-nine percent (175/297) of symposium articles presented original research and 41% (122/297) were review articles, compared with 90% (90/100) of journal articles that presented original research."

"[A] larger proportion of symposium articles than journal articles agreed with the tobacco industry's position."

"The distribution of topics of articles on ETS differed significantly between the symposium articles and the journal articles. The journals contained a larger proportion of articles that assessed the health effects of ETS, including epidemiologic studies and

animal studies. The symposia contained a larger proportion of articles that assessed the effects of factors that could confound an association between ETS and tobacco-related diseases (eg, cooking smoke, radon, and diet)."

"[A] higher proportion of symposium authors than journal article authors were affiliated with the tobacco industry."

"[A] larger proportion of articles from symposia that acknowledge industry funding agreed with the tobacco industry position that ETS is not harmful than articles from symposia that did not acknowledge funding. Articles from symposia that did not acknowledge funding were more likely to focus on confounding factors than articles from industry-sponsored symposia."

"[T]he symposium authors published a lower proportion of peer-reviewed journal articles than the authors of the consensus documents... While 85% (23/27) of the consensus document authors were affiliated with academic institutions, 36% (5/14) of the authors who frequently wrote symposium articles were from universities. In contrast, 43% (6/14) of the symposium authors were consultants to the tobacco industry and one worked for the tobacco industry, while none of the authors of the consensus reports were in similar positions."

"The content of symposia on ETS differs from the content of journal articles on ETS in ways that suggest that symposia are not balanced and that they present the tobacco industry position on ETS. Symposia consist, in large part, of review articles that reach conclusions that are contrary to independent scientific consensus documents and meta-analyses published in journals. Symposium articles minimized the potential effects of ETS on health by claiming that ETS exposure is impossible to measure, or if it can be measured, levels of exposure are not high enough to produce physiological effects... Symposium articles contained a greater emphasis on potential confounding factors than journal articles. Most of the symposium articles, however, exclude ETS from comparative analysis of other health risk factors such as exposure to radon, cooking fuel, or automobile emission. For example, most articles discussing sick building syndrome did not mention ETS as a component of indoor air."

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"The scientific reliability of the journal articles or consensus documents should be considered superior to that of symposia."

"Our data suggest that industry control over publication, rather than industry funding for research, is likely to influence the presentation of findings."

"The finding that data and reviews suggesting that ETS is not a health hazard are published in non-peer-reviewed literature has substantial implications for public policies regarding smoking restrictions. In June 1993, the US Supreme Court ruled that federal judges must ensure that scientific evidence and testimony admitted in trials are reliable. Whether the data have been subjected to peer review and publication is one criterion that judges are expected to consider. This ruling is directly relevant to the lawsuit that the tobacco industry has recently filed against the Environmental Protection Agency (EPA) claiming that the EPA used inaccurate and incomplete data for its risk assessment of ETS. As the court hears this case, it will have to decide whether non-peer-reviewed, tobacco industry-sponsored research, such as that presented in symposium proceedings, is admissible as evidence."

"Sponsored symposium proceedings influence public policy because they are often presented in a misleading fashion, as if they are equivalent to peer-reviewed journal articles, as if they are balanced reviews of the scientific literature, and as if they are not affiliated with the tobacco industry."

"The first tobacco industry-sponsored symposium occurred in 1974, well before journal articles on ETS were published. This suggests that the tobacco industry was concerned about adverse health effects of ETS before the medical community had conducted much research on the topic."

"Data from symposia should be reviewed skeptically since their funding sources may not be acknowledged, they have not been peer-reviewed, and they may not present a balanced overview of the scientific literature."

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APPENDIX B

UPCOMING SCIENTIFIC MEETINGS

- **March 4, 1994**

Indoor Air Quality: An Overview for People Who Need to Know, AIHHM, San Antonio, Texas [Issue 57, Item 35] Same program to be held April 13, 1994, Minneapolis, Minnesota; May 5, 1994, Chicago, Illinois; June 17, 1994, Oklahoma City, Oklahoma; July 14, 1994, Anchorage, Alaska

- **March 8-10, 1994**

Orientation to Indoor Air Quality, U.S. Environmental Protection Agency, Birmingham, Alabama [Issue 65, Item 25]

- **March 12-16, 1994**

Conference, Environmental Information Association, Mission Valley, California [Issue 65, Item 26]

- **March 14-16, 1994**

Indoor Air Pollution, University of Tulsa, Tulsa, Oklahoma [Issue 65, Item 27]

- **March 22-24, 1994**

Indoor Environment '94, IAQ Publications and other sponsors, Washington, D.C. [Issue 61, Item 30]

- **March 28-31, 1994**

Eleventh ORNL Life Sciences Symposium, Indoor Air and Human Health Revisited (Bringing Selected Advances in Medical Science to the Indoor Air Quality Community), Knoxville, Tennessee [Issue 58, Item 43]

- **May 5-7, 1994**

Second Annual IAQ Conference and Exposition, NCIAQ, Tampa, Florida [Issue 49, Item 35]

- **May 22, 1994**

Indoor Air Quality Symposium, American Industrial Hygiene Conference and Exposition, Anaheim, California [Issue 57, Item 34]

- **August 22-25, 1994**

Healthy Buildings '94, Budapest, Hungary [Issue 63, Item 26]

- **September 7, 1994**

One-Day IAQ Course, Environmental Law and Policy Program, George Washington University, Washington, D.C. [Issue 63, Item 25]

- **October 10-14, 1994**

9th World Conference on Tobacco and Health, Paris, France [Issue 60, Item 38]

- **October 18-20, 1994**

Indoor Air Quality in Asia, Beijing, China [Issue 54, Item 42]

- **October 30-November 2, 1994**

IAQ '94: Engineering Indoor Environments, ASHRAE and other sponsors, St. Louis, Missouri [Issue 58, Item 42]

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ETS/IAQ REPORT

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